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Nos. 99-1864 and 99-1865

In the

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*
Appellants,

and

Alfred Smallwood, *et al.*
Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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38 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is there evidence to support the district court's finding that race predominated in creating the Twelfth District?

2. Was the district court correct in finding that the racially gerrymandered Twelfth District did not survive strict scrutiny?

3. Did the district court properly reject Appellants' claim preclusion argument?

4. Did the district court act within its discretion when it prohibited use of the unconstitutional Twelfth District in future elections?

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CITED AUTHORITIES iii

MOTION TO AFFIRM 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 10

I. THE EVIDENCE AT TRIAL AMPLY SUPPORTED THE DISTRICT COURT'S FINDING OF A PREDOMINANT RACIAL MOTIVE 10

A. Circumstantial Evidence Clearly Establishes The Twelfth District's Race-Based Purpose ... 12

B. The Expert Testimony Supported the Finding that Race Predominated in the Formation of the Twelfth District 18

C. Direct Evidence Produced at Trial Confirms the Overwhelming Circumstantial Evidence that the Twelfth District is Racially Gerrymandered 22

II. THE TWELFTH DISTRICT FAILS THE STRICT SCRUTINY TEST 25

III. APPELLANTS' CLAIM PRECLUSION ARGUMENT LACKS MERIT 26

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN PROHIBITING FURTHER USE OF THE TWELFTH DISTRICT .. 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Anderson v. City of Bessemer,
470 U.S. 564 (1985) 11

Bush v. Vera,
517 U.S. 952 (1996) 16, 21

Cromwell v. County of Sac,
94 U.S. 351 (1876) 26

Federated Dept. Stores, Inc. v. Moite,
452 U.S. 394 (1981) 26

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 12

Hays v. Louisiana,
936 F.Supp. 360 (W.D.La. 1996) 28

Hunt v. Cromartie,
526 U.S. 541 (1999) 3, 4, 12, 13

Klugh v. United States,
818 F.2d 294 (4th Cir. 1987) 27

McQueeney v. Wilmington Trust Co.
779 F.2d 916 (3rd Cir. 198 5) 25

Miller v. Johnson,
515 U.S. 900 (1995) 12

Public Service Comm'n of Missouri v. Brashear Freight Lines, Inc. 306 U.S. 204 (1939) 6

Reynolds v. Sims,
377 U.S. 533, 585 (1964) 27, 28

Shaw v. Hunt,
517 U.S. 899 (1996) 1, 25, 27

Shaw v. Reno,
509 U.S. 630 (1993) 6, 12, 14

United States v. Hays,
515 U.S. 737 (1995) 26

Vera v Bush,
933 F.Supp. 1341 (S.D. Tex. 1996) 28, 29

STATUTES & RULES

42 U.S.C. §1973 4

FED. R.CIV. P. 52(a) 11

1998 N.C. Sess. Laws, ch.2, § 1.1 3

SECONDARY AUTHORITIES

Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993) 13

MOTION

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellees move that the Court summarily affirm the judgment sought to be reviewed, or in the alternative, dismiss the appeal on the ground that the questions it raises are so insubstantial as to require no further argument. The extensive record before the district court amply supported its findings that race predominated in drawing the Twelfth District in the 1997 Plan and that the district failed the strict scrutiny test. In light of these findings the court properly concluded that this District should not be used in Congressional primaries or elections.

COUNTERSTATEMENT OF THE CASE

After over four years of legal battle requiring two appeals to this Court, North Carolina's "bizarre" Twelfth District as drawn in the 1992 Plan was finally held unconstitutional. *See Shaw v. Hunt,* 517 U.S. 899 (1996). Three weeks later, on July 3, 1996, Martin Cromartie and two other registered voters in Tarboro filed a separate action in the Eastern District of North Carolina to have the First Congressional District also declared unconstitutional.[1] District Judge Malcolm J. Howard, to whom the case was assigned, entered a stay order and periodically extended it awaiting final resolution of the *Shaw* case.

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[1] None of the original plaintiffs in the *Shaw* litigation had standing to challenge the First District because none of them resided there. On July 9, 1996, a second amended complaint was filed in *Shaw*, listing Cromartie and the other two Tarboro voters in the caption as plaintiffs. (*See* Appellants' J.S. App. at 283a-304a.)

On April 1, 1997, the General Assembly submitted its 1997 Redistricting Plan to the *Shaw* district court for review. On September 12, 1997, that court filed an order approving the 1997 Plan. In so doing, however, the Court emphasized the limited nature of its approval.[2]

On October 10, 1997, after termination of the *Shaw* litigation in the previous month, the *Cromartie* plaintiffs filed an "Amended Complaint and Motion for Preliminary and Permanent Injunction." This amended complaint included as plaintiffs not only the three original plaintiffs from the First District, but also other plaintiffs who were registered voters in the 1997 Plan's Twelfth District. When the State then moved to have the *Shaw* panel take jurisdiction over the *Cromartie* suit, that panel denied the motion;[3] and the State did not appeal.

On January 15, 1998, the *Cromartie* case was

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[2] The district court stated:

> We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not--cannot--run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

(Appellants' J.S. App. at 320a.)

[3] At the same time the State also sought to have the *Shaw* panel consider a case, *Daly v. Leake*, No. 5: 97-CV-750-BO (E.D.N.C filed July 3, 1996), pending before what became the *Cromartie* panel and which challenged not only North Carolina's 1997 congressional redistricting plan but also the State's House and Senate apportionment plans.

reassigned from Judge Howard to a three-judge district court panel consisting of Circuit Judge Sam Ervin III, and District Judges Terrence Boyle and Richard Voorhees. On January 30, 1998, the *Cromartie* plaintiffs renewed the prayer for relief contained in their amended complaint by filing a motion for preliminary injunction; and on February 5, 1998, they moved for summary judgment. On March 3, 1998, defendants responded with their cross-motion for summary judgment.

On April 3, 1998, the district court granted plaintiffs' motions for summary judgment and for preliminary and permanent injunctions. The defendants unsuccessfully requested a stay from the district court and this Court. The district court granted the legislature an opportunity to draw a new plan (the "1998 Plan") and to conduct the 1998 congressional primaries and elections under that plan. The 1998 Plan reduced the African-American population of the Twelfth District to about 35% from almost 47% in the 1997 Plan. Moreover, unlike the 1997 Plan, in which all six counties of the Twelfth District had been divided, the corresponding district in the 1998 Plan had one undivided county and split four others.[4]

The law enacting the 1998 Plan contained a proviso that this plan would be used in the 1998 and 2000 primaries and elections, unless the Court rendered a favorable decision in the appeal the State was pursuing with respect to the district court's summary judgment for plaintiffs. *See* 1998 N.C. Sess. Laws, ch. 2, §1.1. On May 17, 1999, the Court reversed the summary judgment that had been entered in the plaintiffs' favor. *See*

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[4] Instead of splitting four major cities--Charlotte, Winston-Salem, Greensboro, and High Point--as well as Statesville, Salisbury, and Lexington, the 1998 Plan's Twelfth District split only Charlotte and Winston-Salem. Furthermore, the 1998 Plan accomplishes the same purported objectives that were put forward as rationales for the 1997 Plan.

Hunt v. Cromartie, 526 U.S. 541 (1999). The effect of this decision was to reinstate the 1997 Plan for use in primaries and elections in the year 2000.

In *Cromartie,* the Court discussed the evidence and concluded that, although a predominant racial motive of the Legislature could be inferred from the plaintiffs' evidence, the State had raised an issue of fact to be decided in a trial. In remanding for determination of the legislative motive, the Court observed that "the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Id.* at 553-54.

Preparation for trial was extensive and was conducted on an expedited schedule. After the sudden death of Judge Ervin, District Judge Lacy H. Thornburg was assigned to the panel as Circuit Judge Designate; and he presided at the trial, which lasted from November 29, 1999 until December 1, 1999. The plaintiffs called eight witnesses to testify and defendants called four. The court received voluminous documentary evidence.

On March 7, 2000, the district court delivered its opinion, finding race the predominant motive in the creation of the 1997 Plan's Twelfth and First Districts. The court also found "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented." (Appellants' J.S. App. at 29a.) On the other hand, the court found the First District survived strict scrutiny because of the State's compelling interest in avoiding possible liability under Section 2 of the Voting Rights Act. *See* 42 U.S.C. §1973.

Concurrent with filing notice of appeal on March 10, 2000, Appellants requested a stay from the district court. After denial of that request on March 13, 2000, the same day Appellant-Intervenors gave notice of appeal, the Appellants

applied to this Court for a stay; it was granted on March 16, 2000.[5] Almost immediately thereafter Appellees moved unsuccessfully to expedite the schedule for appeal. After Appellants sought a thirty-day extension to file their jurisdictional statement and Appellees filed their opposition, the Court allowed a ten-day extension until May 19, 2000.

SUMMARY OF ARGUMENT

Neither the Appellants' nor the Appellant-Intervenors' jurisdictional statement raises an issue that merits the attention of this Court. Indeed, the Questions Presented ignore the plaintiffs' extensive evidence[6] and relate only tangentially to the record of trial.[7] Moreover, Appellants disregard the

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[5] The Court's order dated March 16, 2000, provided that "[i]f the appeals are dismissed, or the judgment affirmed, this order shall terminate automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court." 529 U.S.__ (2000).

[6] For example, in each jurisdictional statement the first Question Presented refers to the Twelfth District as "somewhat irregular" or "slightly irregular" in shape. Such a description is at odds with any "eyeball" perception of that district as portrayed in maps thereof and with the statistics indicating that the district is one of the least compact in the nation. The Appellants' first Question Presented refers to the State's having "considered race," but the district court found that race was the predominant motive, a finding going far beyond "consideration" or "consciousness" of race.

[7] The Appellants' second Question Presented asks whether the strict scrutiny of *Shaw* is invoked simply by showing that the challenged district was intentionally created as a majority-minority district. Since the Twelfth District in the 1997 Plan was not majority-minority, this Question obviously concerns only the First District, which the court below found to be constitutional since it passed the test of strict scrutiny. As to that district,

statement made by their lead counsel at trial to the effect that the Twelfth District involves "purely a factual matter"--whether race had been the legislature's predominant motive in drawing the District. (Tr. at 31.)

At trial the plaintiffs did not rely solely on the circumstantial evidence they presented some eighteen months earlier in seeking summary judgment. Instead, as a result of extensive discovery and trial preparation, they presented additional persuasive evidence that race had been the predominant motive in creating the 1997 Plan's Twelfth District. This evidence included testimony of three prominent legislators who were serving when the 1997 Plan was enacted and were convinced that a predominant racial motive existed.[8] The plaintiffs also offered testimony of several other persons active in politics and familiar with the contours and voting patterns of the Twelfth District. Each testified from his broad

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the Appellants' Question is misstated because the district court found that race predominated in its creation, and the evidence amply supported this finding. The First District in the 1997 Plan unnecessarily splits nine major cities and towns by race, divides half of its counties, and violates compactness and other traditional redistricting principles. Under the circumstances described by the district court, (*see* Appellants' J.S. App. at 18a, 30a), clearly *Shaw v. Reno*, 509 U.S. 630 (1993), applies and the only substantive issue concerning the First District is whether the district court ruled correctly that it satisfied the test of strict scrutiny. The matter of the First District would be a question for plaintiffs to present--if they chose to do so--rather than for the State defendants. Appellees doubt that Appellants even have standing at this point to seek from the Court an advisory opinion as to whether the evidence concerning the predominance of race in the Majority-Minority First District triggered the test of strict scrutiny. *Cf. Public Service Comm'n of Missouri v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

[8] Unlike the two legislators who testified for the defendants, the plaintiffs' witnesses had no reason to offer *post hoc* rationalizations as to the predominant motive of the General Assembly.

experience that race was the only explanation for the manner in which the Twelfth District had been drawn.

The plaintiffs offered in evidence portions of the 1997 Plan's legislative history which made clear the predominance of race. In addition, plaintiffs presented a "smoking gun" e-mail authored by Gerry Cohen, who operated the General Assembly's computer to create the 1997 Plan.[9] Cohen sent the e-mail to Senators Roy Cooper and Leslie Winner, who both were very involved in preparing the 1997 Plan.[10] This e-mail revealed clearly that race predominated in shaping the First and Twelfth Districts.[11]

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[9] Cohen played a similar role in drawing the 1992 Redistricting Plan.

[10] As a retained counsel for the General Assembly, Senator Leslie Winner had played a major role in creating the unconstitutional 1992 Plan.

[11] The e-mail, Ex. 58, was sent on February 10, 1997, and reflected, *inter alia*, the change which gave the 1997 Plan Twelfth District its ultimate form.

> By shifting areas in Beaufort, Pitt, Craven, and Jones Counties, I was able to boost the minority percentage in the first district from 48.1% to 49.25%. The district was only plurality white, as the white percentage was 49.67%.
>
> This was all the district could be improved by switching between the 1st and 3rd unless I went to Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching precincts between the 1st and 4th in Person/Franklin Counties (Franklin was all in the 1st under Cooper 3.0, but had been in the 4th District in the 80's under Price. By moving four precinct [sic] each way, I was able to boost the District to 49.28% white, 49.62% Black. About 0.6% is native American (Haliwa). I could probably improve thins [sic] a bit more by switching precincts in Granville and Franklin between the 1st and 4th.
>
> I have moved Greensboro Black Community into the 12th, and now need to take bout [sic] 60,000 out of the 12th. I await your direction on this. I am available Tuesday.

At trial, plaintiffs offered as an expert Dr. Ron Weber, a political scientist with extensive experience in redistricting litigation.[12] His detailed expert testimony, (Tr. at 143-321), and related reports established that race clearly predominated as the motive for drawing the Twelfth District. Appellants, on the other hand, offered as an expert Dr. David Peterson, a statistician who lacked prior contact with redistricting. He used an untested methodology which had never received any peer review and was shown to be defective and unreliable.

At the outset of the trial, counsel for Appellants conceded that no "compelling state interest" existed to justify the Twelfth District if the court found race had been the predominant motive in creating that district. (*See* Tr. at 32.) Counsel for Appellant-Intervenors took the same position.[13] (*See* Tr. at 596.) In any event, the district court properly found no evidence had been offered to show any compelling state interest or that the Twelfth District had been narrowly tailored.

Appellants seek to raise an issue of claim preclusion. (*See* Appellants' J.S., Question 3.) The district court properly rejected this defense because the *Shaw* panel made clear in its Memorandum Opinion of September 12, 1997, that claim

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[12] As the Court may be aware, Dr. Weber has been involved extensively as an expert in redistricting litigation in North Carolina, Georgia, Louisiana, Virginia, and Texas.

[13] Appellant-Intervenors did not raise this issue in the pretrial order or during the trial, or offer any evidence in this regard. Under these circumstances, Appellees are surprised that Appellant-Intervenors now contend that the"District Court Erred by Failing to Determine Whether the State had a Compelling Justification for Creating a Narrowly Tailored District 12." (Appellant-Intervenors' J.S. at 22.) It would seem that Appellant-Intervenors would be precluded from raising this issue on appeal because they did not preserve it at trial.

preclusion would not apply.[14] (*See* Appellants' J.S. at 2a-3a & n.1.) Furthermore, even if the *Shaw* panel had intended to bind non-parties, its order would not have this effect under familiar principles of res judicata.

The final Question Presented by each jurisdictional statement concerns the district court's discretion to enjoin the State from using the unconstitutional Twelfth District to conduct primaries and elections this year. However, the court below had ample precedent for enjoining use of an unconstitutional district at this stage in the electoral process.[15] Appellants and Appellant-Intervenors have no basis in the precedents they cite for overturning the district court's decision to prevent use of an unconstitutional congressional district.[16]

Indeed, to allow congressional elections to take place in North Carolina under the unconstitutional 1997 Plan would be an abuse of discretion. The Court would be rewarding the Legislature for its refusal to accept the instruction provided by this Court in the *Shaw* litigation.[17] If the General Assembly had

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[14] Two years earlier the district court took the same view in rejecting this claim preclusion defense. (*See* Appellants' J.S. at 245a-46a.) Apparently neither Judge Ervin nor Judge Thornburg disagreed with the majority on this issue.

[15] For example, in the summer of 1998 the North Carolina Legislature enacted a new redistricting plan, and congressional primaries took place that Fall without incident. In Texas, in 1996, thirteen congressional districts were redrawn and congressional primaries took place uneventfully at the time of the general election.

[16] The 1997 Plan had not been used previously; and so the issue was not whether to allow continued use of a plan, but instead whether to permit the initial use of an unconstitutional district for an election.

[17] Instead of applying traditional race-neutral redistricting principles, the State seeks to retain as much as possible of the unconstitutional 1992 Plan. The legislative history states an intent to retain in the 1997 Plan the "cores" of the districts in the earlier 1992 Plan. In the words of Senator Cooper, the

proceeded promptly to enact a constitutional redistricting plan after the district court's decision early in March 2000, confusion and cost could have been avoided in various ways. Appellants now seek to invoke the problems created by their own obstinance as the reason for compelling the district court to allow use of the unconstitutional 1997 Plan in current elections. The Court should not reward such tactics and deprive the district court of the opportunity to consider the many feasible alternatives to using the unconstitutional Twelfth District.

ARGUMENT

I. THE EVIDENCE AT TRIAL AMPLY SUPPORTED THE DISTRICT COURT'S FINDING OF A PREDOMINANT RACIAL MOTIVE.

Carefully adhering to the instructions of this Court on remand, the district court conducted a three-day trial from November 29, 1999 to December 1, 1999. It heard evidence from twelve witnesses, received over 1100 pages of deposition designations from seventeen depositions, and had before it over 350 trial exhibits--including 225 maps bound in seven three-ring binders of four-inch thickness.

Sustaining the findings of fact based on this vast array of evidence requires only that the findings not be "clearly erroneous." This standard of review recognizes that the trial

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Twelfth District "uses as a foundation the basic core of the existing Congressional districts. No district is dramatically changed." Feb. 20, 1997 meeting of the Senate Committee on Congressional Redistricting, 97C-28F-4D(2) at 3, (Ex. 100). The Twelfth District "core" obviously was viewed in racial terms. 90.2% of the African-Americans in the 1997 Plan's Twelfth District had been in that district in the 1992 Plan, but only 48.8% of the whites had been in the 1992 Plan's Twelfth District. (*See* Tr. at 123.)

court is better positioned to determine the facts than is an appellate court. *Cf.* Fed. R. Civ. P. 52(a). Appellants have previously asserted that "[t]he application of the principles laid out by this Court in *Shaw* and its progeny is not a simple exercise and requires an exacting and fact-intensive inquiry," (Appellants' Application for Extension of Time to File Jurisdictional Statement at 3), and they apparently contend that it has become "necessary for this Court to undertake the [factfinding] task itself" to determine whether race did in fact predominate in the drawing of the Twelfth District. (*Id.*, at 3-4.) Similarly, the Appellant-Intervenors asserted that "on appeal, this Court will have to determine what role, if any, that race played in the redistricting process." (Appellant-Intervenors' Application for Extension of Time to File Jurisdictional Statement at 2.)

Both Appellants and Appellant-Intervenors apparently have forgotten that "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574. Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (citations omitted). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.*

The plaintiffs' burden was "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision

to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The district court properly found that Appellees have met their burden. Appellants now go so far as to maintain that the plaintiffs' evidence offered at trial was insufficient. This contention seems somewhat at odds with the Court's statement in remanding the case for trial that "reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding." *Cromartie*, 526 U.S. at 552.

Appellees construe this observation to mean that the evidence they offered in 1998 was legally sufficient. However, this becomes academic, because when the case was tried in November 1999, Appellees presented not only all the evidence previously before the district court in 1998, but also extensive additional direct and circumstantial evidence that race predominated as the motive for the Twelfth District. Not only was the evidence legally sufficient to establish this, but it overwhelmingly supported this contention. Obviously, the district court was not "clearly erroneous" in making its findings in accord with this evidence.

A. Circumstantial Evidence Clearly Establishes The Twelfth District's Race-Based Purpose.

This Court has recognized that some districts are "so highly irregular that [they] rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. at 646-47 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)). The Twelfth is such a district.

The undisputed facts show it to be one of the least compact congressional districts in the Nation, ranking either 432 or 433 out of 435 districts in "perimeter compactness" and

430 or 431 in "dispersion compactness." (Tr. at 206.) The district court found the Twelfth District's dispersion score of 0.109 and its perimeter score of 0.041 were both below the suggested "low" compactness measures articulated in Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-73, tbl.6 (1993). (*See* Appellants' J.S. App. at 16a.) The Twelfth District is the only district in the 1997 Plan with such minimal compactness and which splits every county. The district court also found the Twelfth District was less compact than districts elsewhere that had previously been held unconstitutional. (*See id.* at 26a.)

Although the Twelfth District is somewhat wider and shorter than its unconstitutional predecessor, it generally follows the path of the 1992 Plan's Twelfth District and retains its basic "snakelike shape." *Cromartie*, 526 U.S. at 544. In fact, one legislator, in comparing the 1997 version of the Twelfth District with its 1992 predecessor, complained that "all you have done with the 12th District in this bill is knock sixty miles off of it." Mar. 26, 1997 Floor Debate of HB 586 on House Floor 97C-28F-4F(1) at 12, (Ex. 100).

When the District's bizarre shape is combined with its demographics, the single unifying factor explaining its geographical anomalies is race. As the district court found, "[t]he only clear thread woven throughout the districting process is that the border of the Twelfth District meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." (Appellants' J.S. App. at 25a.) The circumstantial evidence presented to the district court exhaustively demonstrates this fact.

The Twelfth District's total African-American population is 46.67%, a percentage the district court doubted was "sheer happenstance." (*Id.* at 28a n.8.) The percentage of

African-Americans in the six counties split by the Twelfth District is 23.6%, half of 46.67%. Guilford County has the highest percentage of African-Americans in the six split counties at 26.4%. The district court further found that almost 75% of the total population in the Twelfth District came from mostly African-American portions of the three urban counties at the ends of the district, along with parts of the three rural counties that have "narrow corridors which pick up as many African-Americans as needed for the district to reach its ideal size." (*Id.* at 12a.) As the district court also noted, in further disregard of political subdivisions the Twelfth District split its four cities and many towns along racial lines.

The district's distorted shape, therefore, results from its twisting through the Piedmont area of North Carolina to include within its boundaries as many African-Americans as possible without exceeding 50% of the total population.[18] This is depicted clearly in a map offered in evidence by Appellees.[19] (*See* Ex. 106.) As shown there, the Twelfth District starts in Mecklenburg County near the South Carolina border and moves north to include all 26 majority African-American precincts in that County, as well as all precincts with an African-American population exceeding 40%.[20]

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[18] The General Assembly mistakenly believed that so long as the African-American population was not a majority, *Shaw v. Reno* would not apply and it would be free to draw the Twelfth District in any manner it chose in disregard of traditional race-neutral redistricting principles. *See infra* note 33.

[19] This map is lodged with the Court, as are two other maps. Exhibit 253 shows the partisan voting performance in the 1988 Court of Appeals race in the area of the Twelfth District. Exhibit 305 shows the evolution of the Twelfth District from the 1992 to the 1997 and 1998 versions.

[20] Mecklenburg County's Precinct 77 bordering South Carolina is divided between the Twelfth and the Ninth Districts to provide a narrow "land bridge" between the eastern and western portions of the Ninth District. This

As the Twelfth District continues its journey north out of Mecklenburg into Iredell County, it narrows to a mere precinct --as it does frequently in other areas of the district in order to prevent including concentrations of white voters. Upon reaching Statesville, it juts west to include two precincts with high African-American concentrations. Then its path meanders east into Rowan County, where it snakes to the south to pick up concentrations of African-Americans in Salisbury.[21] Next, the Twelfth District moves north into Davidson County, where it also includes all precincts exceeding 40% in African-American population.

The district then branches into two directions--into Forsyth County and into Guilford County. The boundaries of the Twelfth District in Forsyth County are almost perfectly tailored to maximize its minority population. (*See* Ex. 106.) The district court observed that "[w]here Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American." (Appellants' J.S. App. at 12a.) In Forsyth County only two precincts with African-American populations less than 40% of the total population were included in the Twelfth District. Those two precincts comprise part of the Twelfth District's land bridge into Forsyth County.[22]

"land bridge" prevents the Twelfth District from cutting the Ninth District in half and thereby making it non-contiguous.

[21] Plaintiff R.O. Everett, a Salisbury resident, testified in minute detail as to how that town had been divided along racial lines. (Tr. at 80-100.)

[22] Hamilton Horton, who represents Forsyth County in the North Carolina Senate, testified that the Twelfth District's boundaries reflected its racial predominance in that area by splitting Winston-Salem along racial lines, noting that the mostly white and Democratic Salem College community was bypassed to reach African-American areas. (*See* Tr. at 32-47).

Similarly, the branch of the district shooting into Guilford County also includes virtually all precincts in that county with an African-American population in excess of 40%.

As the district court found, "where cities and counties are split between the Twelfth District and neighboring districts, the splits invariably occur along racial, rather than political, lines - the parts of the divided cities and counties having a higher proportion of African-Americans are always included in the Twelfth." (*Id.* at 25a.) This observation by the district court is true whether measuring voting performance or party registration. As Dr. Weber testified, his analysis of voting performance was "very consistent" with a registration analysis. (Tr. at 240.)

This can be quickly confirmed by a comparison of the racial percentage map of the Twelfth District, Exhibit 106, and the voting results map of the Twelfth District for the Court of Appeals race.[23] (*See* Ex. 253.) There is some correlation between party and boundaries of the Twelfth District; but this correlation pales in comparison to the precision match between the boundaries of the Twelfth District and the predominately African-American precincts. In mixed motive cases, a line which corresponds more precisely to racial demographic data than partisan demographic data is important evidence of a predominantly race-based district. *See Bush v. Vera,* 517 U.S. 952, 970-75 (1996).

Exhibit 106 and scores of similar maps reviewed by the district court emphatically support its finding that race was the predominant factor in the creation of the Twelfth District. They show exactly why 75% of the district's population is pulled from the extremes of the district, why the district meanders as

[23] According to Gerry Cohen, the primary draftsman for both the 1992 and 1997 plans, the 1988 Court of Appeals race was loaded onto the redistricting computer in order to be an indicator of generic party voting strength. (*See* Cohen Dep. at 49.)

it does, and why it narrows to the width of a single precinct in numerous places.[24]

As the district court found, Dr. Weber "showed time and again how race trumped party affiliation in the construction of the Twelfth District and how political explanations utterly failed to explain the composition of the district." (Appellants' J.S. App. at 26a (citing Tr. at 162-63, 204-05, 221, 251, 262, 288).)

Moreover, as Dr. Weber testified, and as was demonstrated by Congressman Watt's comfortable re-election under the State's 1998 redistricting plan, a solid Democratic performance district can be created without the contortions contained in the Twelfth District.[25] (*See* Tr. at 205, 220-21.)

[24] The district court also had the benefit of hundreds of other maps and other exhibits primarily detailing breakdowns of all the measurements of party performance as recorded in the State's redistricting computer according to precinct, county, and district. While the Republican victory maps in the Appellants' appendix are accurate, they are misleadingly designed. They do not show the corresponding Republican victories *within* the boundaries of the Twelfth District, but only the victories in the immediate precincts outside. Nor do they show relative levels of party support. (*See* Appellants' J.S. App. at 213a-21a.)

[25] Appellants criticize the district court for failing to give proper deference to the General Assembly because it noted that "a much more compact, solidly Democratic Twelfth District could have been created." (Appellants' J.S. at 18 n.21.) However, the Appellants mischaracterize the language and logic of the district court as saying that because such a district could have been created, it should have been created. (*See id.*) In fact, the district court was not dictating any choice to the General Assembly by making this and similar observations. Instead, it was attempting to determine after the fact whether a racial or political motive had predominated. The district court properly considered relevant the fact that the General Assembly did not conform to standard procedures and guidelines usually employed when drawing lines for political reasons, but rather drew a district whose shape and demographic breakdowns conform to patterns usually found when race is the predominant motive.

Approximately 95% of North Carolina African-Americans are loyal Democrats. Consequently, the State's effort to set the Twelfth District's African-American population at just under 50% resulted in making the district so overwhelmingly Democratic that it cannot be explained by partisan purposes.[26] Rather, it was designed to ensure that the vast majority of those voting in the Democratic primary would be African-American and to make sure that an African-American Democratic nominee would win the seat.

B. The Expert Testimony Supported the Finding that Race Predominated in the Formation of the Twelfth District.

Dr. Weber is a nationally recognized expert in redistricting who has been involved in nearly all the major racial gerrymandering cases in the 1990s, as well as numerous other redistricting cases. He also has extensive experience assisting legislators in drawing redistricting plans. In a futile effort to disparage his persuasive testimony in this case, Appellants have made several misstatements to the Court.

First, they claim that the district court had followed Dr. Weber's footsteps in not considering voter performance data. However, as Dr. Weber testified extensively, he analyzed voting performance and the results were "very consistent" with a registration analysis. (Tr. at 240.)

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[26] The district is also electorally too safe to be explained as a Democratic political gerrymander. (*See* Tr. at 161-63.) Democratic candidates for other elections conducted within the boundaries of the Twelfth District receive voting percentages of 65% or higher. (*See* Tr. at 162.) The election results contained in Dr. Weber's analysis are considerably above the 60% threshold used to determine whether a district provides a safe seat, (*See* Tr. at 162), and they reflect a waste of some Democratic votes in order to achieve a racial goal.

Second, Appellants incorrectly state that the district court, like Dr. Weber, "based its conclusion on an examination of a few select precincts along the district's borders, rather than all of them." (Appellants' J.S. at 20.) In fact, Dr. Weber analyzed every precinct in all six counties of the Twelfth District. (*See* Weber Decl., tbl.5, Ex. 47.)

Third, Appellants insinuate that the only basis of Dr. Weber's opinion that race predominated was his incorrect assumption that the State's computer program had no political data, as was the case for similar software in Louisiana. (Appellants' J.S. at 10 n.13.) However, Dr. Weber's opinion that race predominated was primarily based on the demographic facts of the Twelfth District--not his belief as to what was on the State's computer. Also, before trial, Dr. Weber obtained the correct information concerning the State's computer data and took this data into account when he testified. (*See* Tr. at 261.)

Fourth, Appellants contend that when Dr. Peterson used Dr. Weber's methodology for analyzing the split counties according to partisan as well as racial data, this analysis "established equally conclusively that Democratic performance dictated the splitting of counties and towns in both Districts 12 and 1." (Appellants' J.S. at 10 n.13.) To the contrary, Dr. Weber noted that the racial differences in this data were significantly greater than the political differences. (*See* Tr. at 265-66.) This was also admitted by Appellants' expert, Dr. Peterson, on cross-examination. (*See* Tr. at 507-08.)

Finally, Appellants refer to Dr. Weber as having an "ingrained personal bias," (Appellants' J.S. at 10 n.13), but state that Dr. Peterson is "an unbiased statistical expert."[27] (*Id.* at 21.) In any event, it is not the function of this Court to

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[27] Ironically, Dr. Peterson was compensated at a rate of $335.00 an hour, which was over twice as much as what Dr. Weber--the alleged "hired gun"--charged for his time.

determine which expert witness was more "biased" or "credible." That was the factfinding function of the district court, which found Dr. Weber's testimony to be convincing.

The district court also recognized that Dr. Weber had "presented a convincing critique of the methodology" used by Dr. Peterson. As it noted:

> Dr. Weber characterized Dr. Peterson's boundary segment analysis as non-traditional, creating "erroneous" results by "ignoring the core" of each district in question. In summary, Dr. Weber found that Dr. Peterson's analysis and report "has not been appropriately done," and was therefore "unreliable" and not relevant.

(Appellants' J.S. App. at 27a (citations omitted).)

Dr. Peterson's rejected analysis--the so-called "segment analysis"--was unprecedented. Not only was he unaware of any application of this analysis to any other political district, (*see* Tr. at 508), but his "segment analysis" had not been presented at any academic institution or published in any scholarly journal for peer review. (Tr. at 509.) Where the analysis had used a number of instances of faulty data--such as data indicating there were over twice as many African-American registered voters as African-Americans residents of a precinct--Dr. Peterson made no attempt to correct that data. (*See* Tr. at 512.)

Upon careful review of Dr. Peterson's work, it was clear he had given no consideration to the "core" of the district. Thus, it was irrelevant to his "segment analysis" whether or not inner precincts in the Twelfth District--precincts not directly on the boundary--were 100% white, 100% African-American, 100% Democrat or 100% Republican. (*See* Peterson Dep. at 70.) Nor did he attempt to take into account the larger scale decisions that went into creating the Twelfth District. (*See*

Peterson Dep. at 63.) Thus, he paid no attention to whether or not the precinct segments he considered involved rural connector precincts or urban core precincts, or whether the General Assembly chose to follow a county boundary in certain areas.[28] (*See* Tr. at 511.) In his "segment analysis," he arbitrarily discounted approximately 80% of the total border precincts which he deemed "convergent." (*See* Tr. at 490.) Moreover, of the segments he did consider, each was given equal weight regardless of population or the relative differences in their respective populations.[29] Instead of counting people, he counted segments and ignored the circumstance that a long land bridge had been constructed to connect large concentrations of African-Americans in Mecklenburg County with similar concentrations in Forsyth and Guilford Counties.[30]

These and many more flaws in Dr. Peterson's "segment analysis" turned his study into a meaningless mathematical exercise unrelated to the demographic realities of the Twelfth District. This exercise does not focus on the areas where racial gerrymandering was possible to see if it in fact occurred. Instead, it submerged these probative precincts in a sea of irrelevant rural corridor precincts where there was no

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[28] In rejecting Dr. Peterson's analysis, the district court properly followed the guidance given by this Court. *See Bush v. Vera*, 517 U.S. at 972 n.1 (criticizing the dissent for ignoring "the necessity of determining whether race predominated in the redistricters' actions in light of what they had to work with").

[29] For example, with respect to one boundary segment, between High Point Precincts 1 and 4, Dr. Peterson observed that seven African-Americans out of a total registered voter population of 2,114 on the outside was a higher proportion than four out of 1, 212 on the inside. This trivial difference, less than .01%, was used as evidence counting against the "racial hypothesis." (*See* Peterson Dep. at 59-60.)

[30] Prior to the creation in 1992 of the racially gerrymandered Twelfth District, no parts of Mecklenburg and Guilford counties had been combined in a congressional district since 1793.

opportunity to racially gerrrymander. Moreover, even if the district court had accepted at face value Dr. Peterson's testimony, the gist of his testimony was that he was unable to determine whether race or party predominated over the other. (Tr. at 487-88.) These admittedly inconclusive results lack evidentiary value.

C. Direct Evidence Produced at Trial Confirms the Overwhelming Circumstantial Evidence that the Twelfth District is Racially Gerrymandered.

Appellees' case is not purely circumstantial as Appellants and Appellant-Intervenors have asserted to the Court in their Questions Presented. Many contemporaneous statements in the legislative record contradict Appellants' *post hoc* rationalizations. Moreover, three leading legislators who were members of the General Assembly when the 1997 Plan was enacted testified specifically that race had been the predominant factor in its creation. Senator Hamilton Horton, who represented Forsyth County, testified that this County and its chief city, Winston-Salem, were split along racial lines, and that the Twelfth District was created predominately with a racial motive. (*See* Appellants' App. at 5a.) Representative Wood, who was the Speaker *pro tem.* of the House, testified that "the 1997 Plan divided High Point and Guilford county along racial lines for a predominantly racial motive." (*Id.* at 6a.) Representative John Weatherly also testified that the Twelfth District was drawn for predominantly racial reasons. (*See id.*)

The "smoking gun" e-mail from Gerry Cohen to Senators Cooper and Winner was also important direct evidence. It referred to moving the "Greensboro Black Community" into the Twelfth District from a prior plan that did not include Greensboro citizens and the resulting need to "take

[a]bout 60,000 out of the 12th."[31] (*Id.* at 8a.) *See also* full text *supra* note 11.

The district court properly found this e-mail demonstrated that the State "had evolved a methodology for segregating voters by race, and that they had applied this method to District 12." (Appellants' J.S. App. 27a.) The district court also found that the e-mail's discussion of plans to "improve" the First District by "boost[ing] the Minority Percentage" of that district was relevant "evidence of the means by which the 1997 Plan's racial gerrymandering could be achieved with scientific precision." (Appellants' J.S. App. at 28a.)

As the district court perceived, some of the testimony of the State's witnesses lacked credibility. For example, the court below doubted the claim by the state's primary witnesses, Senator Cooper and Representative McMahan, that there had been no specific racial target for the Twelfth District.[32] Indeed, the record is replete with indications that the State was attempting to keep the African-American percentage in the Twelfth District close to, but not over, 50% in order to make

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[31] This e-mail seems readily susceptible to the interpretation that 60,000 African-Americans had just been moved into the district and a corresponding number of whites needed to be taken out.

[32] In footnote 8 of the lower court's opinion, it stated that: "Senator Cooper claimed that the final percentage of District 12 was sheer happenstance. The explicit discussion of precise percentages in the e-mail belies this characterization." (Appellants' J.S. App. at 28a.) Also, the district court found that "exact racial percentages were used when constructing districts." (*Id.*) This was also shown by Representative McMahan's statement to his colleagues that "we have done our best--our dead level best--to draw two Districts that are fair racially and do have one of them the majority of the population and the other one over 46%, and that's the very best we could do on both sides, and we looked at this very, very closely." House Floor Statement of Rep. McMahan, March 26, 1997 97C - 28F - 4F(1), (Ex. 100).

the district immune to constitutional challenge.[33] The district court concluded that Senator Cooper's allusion to the need for "racial and partisan balance" in the legislative record also bolstered plaintiffs' claim that race predominated in the creation of District 12. (Appellants' J.S. App. at 27a.) The district court specifically found that Senator Cooper's "contention that although he used the term 'partisan balance' to refer to the maintenance of a six-six Democrat-Republican split in the congressional delegation, he did not mean the term 'racial balance' to refer to the maintenance of a then ten-two balance between whites and African-Americans is simply not

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[33] Senator Cooper said:

> I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority-minority and it said that you cannot use race as the predominant factor in drawing the districts.
>
> Well guess what! **The 12th District, under this plan, is not majority-minority. Therefore it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt* will not even be triggered because it is not a majority-minority district and you won't even look at the shape of the district in considering whether or not it is constitutional.** That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District.
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> Mar. 27, 1997 Floor Debate of HB 586 in Senate Chamber, 97C-28F-4F(2) at 5-6 (emphasis added) (Ex. 100).

credible."[34] (*Id.*)

II. THE TWELFTH DISTRICT FAILS THE STRICT SCRUTINY TEST.

Appellant-Intervenors now contend that "The District Court Erred by Failing to Determine Whether the State Had a Compelling Justification for Creating a Narrowly Tailored District 12." (Appellant-Intervenor's J.S. at 22.) This argument is frivolous.

Neither Appellants nor Appellant-Intervenors presented any factual or legal contention that a compelling government interest supported the creation of the Twelfth District. Also, the Appellants made quite clear at the opening of trial that they were not claiming that the Twelfth District was supported by a compelling state interest. Specifically, the Appellants' lead counsel--with no dissent from Appellant-Intervenors' attorneys sitting at her side--stated, "we're not arguing compelling state interest" with regard to the Twelfth District. (Tr. at 30-31.) Counsel for the Appellant-Intervenors only briefly addressed the Twelfth District in his closing argument. He stated flatly that "Ms. Smiley [Appellants' counsel] covered our position." (Tr. at 595.) Further he stated that "once we understood the law after *Shaw v. Hunt*, that there couldn't be--there was no basis for a majority-minority district in the 12th." (Tr. at 596.) Thus, the district court correctly found that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented and even if such interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" (Appellants' J.A. App. at 29a.)

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[34] The evasiveness and lack of candor of Appellants' witnesses was both impeaching evidence and substantive evidence against Appellants' claim. *Cf. McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985).

III. APPELLANTS' CLAIM PRECLUSION ARGUMENT LACKS MERIT.

Appellants rely for preclusion on an order entered on September 12, 1997, in the *Shaw* litigation which allowed use of the 1997 Plan as a remedy for the violation of the rights of those *Shaw* plaintiffs who were registered voters in the 1992 Plan's Twelfth District. The terms of the order make clear that it did not intend to adjudicate challenges of the constitutionality of the 1997 Plan made by persons who had not been held to be entitled to relief in the *Shaw* litigation. Thus, to preclude Appellees' claim would give the order an effect never intended by the *Shaw* court.

Furthermore, claim preclusion requires (1) a final judgment on the merits, (2) the same claim or claims, (3) and the same parties. *See Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351 (1876). Here none is present. The language of the Memorandum Opinion entered by the *Shaw* court on September 12, 1997, leaves no doubt that the Court was not rendering a "final judgment" as to the constitutionality of the 1997 Plan's Twelfth District. Instead, it only decided that the Twelfth District was an adequate remedy for violating the Equal Protection rights of those *Shaw* plaintiffs who resided in the 1992 Plan's Twelfth District. Since the 1997 Plan removed those persons and their entire county from the Twelfth District, their claim is quite different from challenges of the 1997 Plan's Twelfth District by registered voters in that District. The parties also are not the same. *Cf. U.S. v. Hays*, 515 U.S. 737 (1995). Appellees J.H. Froelich and R.O. Everett, who live in the 1997 Plan's Twelfth District, were not parties to the *Shaw* litigation; and therefore were in no way precluded by the *Shaw* panel's order of September 12, 1997.

In a futile effort to overcome this last defect, Appellants

invoke a theory of "virtual representation." They contend that plaintiffs Froelich and R.O. Everett had been "virtually represented" by attorney Robinson O. Everett, who is counsel of record in the *Cromartie* case and had been a plaintiff in the *Shaw* litigation. This contention overextends virtual representation. *See, e.g., Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987). Also, it ignores the circumstance that, under the holding in *Shaw v. Hunt*, 517 U.S. at 904, Robinson Everett lacked standing to be a plaintiff in that case because he did not reside within the 1992 Plan's Twelfth District. Thus, he could not have "represented" the interests of Froelich and of his cousin, R.O. Everett, even had he sought to do so. The Court should reject the Appellants' defense of claim preclusion as has every judge who has considered it.

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN PROHIBITING FURTHER USE OF THE TWELFTH DISTRICT

Appellants and Appellant-Intervenors contend that the lower court abused its discretion by prohibiting use of the 1997 Plan's Twelfth District in an election after it had been held unconstitutional. Appellant-Intervenors cite some cases in which district courts exercised their discretion to delay imposing a remedy for an upcoming election. (Appellant-Intervenors J.S. at 25-27.) However, they have not cited--and Appellees cannot find--any case where a district court had abused its discretion by enjoining the use of an unconstitutional redistricting or reapportionment plan.

"[O]nce a State's legislative apportionment scheme had been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The district court was well aware that this was not "the unusual

case." *Id.* Familiar with the history underlying this case, the district court recognized that Appellants had consistently refused over many years to enact a race-neutral redistricting plan. If any "equitable considerations" were present, they pointed toward granting immediate relief to the Appellees, rather than to delay. The district court.was well aware that Appellants' did not have clean hands because they had used *post hoc* rationalizations to obscure the true facts, had offered explanations that were "not credible," (Appellants' J.S. App. at 27a), and had been steadfastly "defending the indefensible." *Hays v. Louisiana*, 936 F.Supp. 360, 372 (W.D. La. 1996).

Had the Appellants done the right thing and drawn a constitutional plan in 1993 after the Court's first decision, they would not be in the situation of which they now complain. However, as in Louisiana, Appellants have reacted to the Court's decisions, not by repudiating racial gerrymandering, but by adopting a new plan with a "physically modified but conceptually indistinguishable 'new' [district], again violating historical political subdivisions and ignoring other traditional redistricting criteria." *Id.* at 372. Appellants' shameless appeal to the lateness of the decade deserves a firm rebuke from this Court.[35]

The district court knew from the 1998 experience that the State has the capacity to organize and conduct a special Congressional primary in the Fall if it chooses to do so. Moreover, the district court was undoubtedly aware that many states hold their entire primary and general election cycle in the Fall, and that there is a "typical post-Labor Day focus" to most political campaigns. *See Vera v Bush*, 933 F.Supp. 1341, 1351

[35] In closing argument Appellants' lead counsel accused Appellees of laches. This evoked from Judge Boyle the observation that "[Y]ou can't make the argument that the decade has run when you have been fighting this the entire last eight years." (Tr. at 586.)

(S.D. Tex. 1996).[36]

The district court was further aware of the danger that if the unconstitutional district were used in the 2000 election, the State and the Department of Justice might seek to use it as a benchmark for the drawing of districts for the year 2002 and thereafter.

Finally, the district court was aware that after three elections under a flagrantly gerrymandered Twelfth District as created by the 1992 Plan, the 1998 elections had been conducted in a district that adhered much more to traditional race-neutral principles. Undoubtedly, the district court realized that to allow initial use in the 2000 election of the unconstitutional 1997 Plan that has twice been held unconstitutional and is clearly more racially gerrymandered than the plan used in the 1998 election would be an insult to the Equal Protection rights of the Appellees and other registered voters of the Twelfth District, would offend fair-minded persons, and would enhance distrust of both the electoral process and the judicial process.

Appellants have engaged in legislative and legal maneuvers which deserve no reward from the Court. Indeed, if the Court allows this meritless appeal to go forward for argument in the next Term, Appellants' tactics of delay provide them an outcome--use of the 1997 Plan--which is entirely at odds with the result of the trial which this Court ordered in May 1999. The Court should make it clear that delaying tactics will not succeed in attaining unconstitutional objectives.

[36] In 1996, in Texas a primary election was set aside and a special election held in thirteen redrawn districts in conjunction with the high-turnout Presidential election, and a run-off in those few districts which required it. *See Vera*, 933 F.Supp. at 1351. If that remedy was within the equitable discretion of a district court, surely enjoining in March 2000 the first use of the unconstitutional 1997 Plan was within the discretion of the court.

CONCLUSION

For the above stated reasons the Court should grant Appellees' motion for summary affirmance of the decision below, or in the alternative dismissal of the appeal.

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